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No. 85-298

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

JOHN F. CONNOLLY,
Petitioner,
v.
ANDREW K. BURT,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, THE AMERICAN COUNCIL ON EDUCATION, AND THE ASSOCIATION OF AMERICAN MEDICAL COLLEGES AS AMICI CURIAE

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BRIEF OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, THE AMERICAN COUNCIL ON EDUCATION, AND THE ASSOCIATION OF AMERICAN MEDICAL COLLEGES AS AMICI CURIAE

This brief is filed in support of petitioner Professor Connolly on behalf of the American Association of University Professors, the American Council on Education, and the Association of American Medical Colleges. Letters of consent from both parties have been filed with the clerk.

INTEREST OF AMICI CURIAE

All three amici are membership organizations which seek to advance the interests of higher education, promote and protect scholarly research, and facilitate cooperation among faculty members, institutions of higher

learning, and the community. The organizations have a national perspective on issues of academic freedom, student rights, and the norms of the academy, and are thus well situated to address the grave problems created by the decision of the court of appeals in this case.

The American Association of University Professors ("AAUP") is a national association of over 50,000 faculty members and research scholars in all academic disciplines. Founded in 1915, AAUP has as one of its central tasks the development of policy statements intended to establish minimum standards of institutional practice in higher education. Policies endorsed by AAUP include the seminal 1940 *Statement of Principles on Academic Freedom and Tenure*, the 1966 *Statement on Professional Ethics*, and the 1981 *Preliminary Statement on Judicially Compelled Disclosure in the Nonrenewal of Faculty Appointments*.[1] The latter bears on letters of reference written by faculty members about colleagues in the same or other institutions in connection with decisions about initial appointment, reappointment, and granting of indefinite tenure. AAUP is uniquely situated to speak to the professional responsibilities of faculty members.

The American Council on Education ("ACE") was founded in 1918 and includes in its membership over 1400 colleges and universities and 145 higher education organizations across the United States. ACE attempts to promote and preserve the interests of all who compose the academic community—students, faculty, and administrators. Among its activities, ACE promulgates policies on issues such as the confidentiality of faculty personnel files. It shares with the other amici a vital concern about the effectiveness of evaluation processes.

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[1] All but the last of these may be found in AAUP POLICY DOCUMENTS AND REPORTS (1984), a copy of which is in the collection of the Supreme Court library. The *Preliminary Statement on Judicially Compelled Disclosure* appears at 67 ACADEME 27 (February-March 1981).

The Association of American Medical Colleges ("AAMC") is composed of all 127 accredited and operating medical schools in the United States, 436 teaching hospitals, and 76 academic and professional societies. The aggregate membership of these constituent components is over 100,000 physicians and scholars who are actively engaged in medical education, biomedical research, and the provision of patient care. AAMC's fundamental purposes are advancing medical education and the nation's health, and to these ends it is essential that scholars offering professional opinions about former students and fellow researchers freely offer their candid judgments.

All three amici, which appear from time to time in this Court in cases of central importance to the academic community,[2] respectfully submit that affirmance of the court of appeals decision would seriously undermine processes for professional and scholarly evaluation.

STATEMENT OF THE CASE

Professor John Connolly received an inquiry in 1980 concerning a former student, Dr. Andrew Burt, from a Denver hospital to which Burt had applied for staff privileges. Professor Connolly, chair of the University of Nebraska Medical Center's Department of Orthopedic Surgery, responded by letter confirming that Dr. Burt had served a three-year residency at the university. Connolly expressed his professional opinion that Burt's performance was "well below average" and that, while he might function satisfactorily in some other branch of medicine, Burt was not suited to the practice of orthopedic surgery.

The hospital denied staff privileges to Burt, who subsequently filed an action for defamation and related

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[2] *E.g., Regents of the Univ. of Mich. v. Ewing*, 54 U.S.L.W. 4055 (U.S. Dec. 12, 1985); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

claims against Connolly and the University of Nebraska in federal district court in Colorado. After the action was filed, Burt moved to California where he now resides. Connolly was, and remains, a Nebraska resident. He owns no property in Colorado and has transacted no business there. His sole contact with that state was the mailing of a private letter expressing his professional opinion in response to an inquiry about a former student. Answering the inquiry offered no prospect of personal or financial advantage for Connolly or his university, but was rather the rendering of a traditional academic service, an ordinary element in the regular process of professional references and evaluation.

The claims against the university were dismissed on grounds of sovereign immunity. The district court granted Connolly's motion to dismiss for lack of *in personam* jurisdiction. The court ruled that the action was technically within the reach of Colorado's long-arm statute. Colo. Rev. Stat. § 13-1-124(1)(b) (1973). The statute confers jurisdiction to the Colorado courts in actions involving "[t]he commission of a tortious act within this state," and the district court observed that the element of "publication" of the allegedly defamatory letter occurred in Colorado. The court concluded, however, that Connolly lacked sufficient minimum contacts with the state to satisfy due process. The court of appeals, Judge Seth dissenting, reversed on the basis of *Keeton v. Hustler Magazine, Inc.*, 104 S.Ct. 1473 (1984) and *Calder v. Jones*, 104 S.Ct.1482 (1984). The court of appeals emphasized that Colorado has a significant interest in deterring the commission of torts within its borders. It found that due process notions of fairness were not violated when an alleged intentional tortfeasor is called to account in any jurisdiction where harm supposedly occurred. In dissent, Judge Seth pointed out that the letter was solicited by Burt and concerned events occurring in Nebraska rather than Colorado. He ob-

served that the district court must have found that Connolly could not reasonably have anticipated being sued in Colorado. Review in this Court is directed to the constitutionality of the Colorado long-arm statute under the Fifth and Fourteenth Amendments as applied to Professor Connolly, whose sole contact with Colorado was in mailing the letter to a Colorado address.

SUMMARY OF ARGUMENT

Professor Connolly in his petition for certiorari aptly described the effect of the court of appeals decision as the designation of each of a faculty member's former students as his agent for service of process. *World-wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). Faculty members provide letters of reference about students and fellow scholars as part of their professional obligations to their disciplines; given the mobility of these populations such letters commonly cross state lines. Amici argue that a solicited letter of reference does not alone satisfy the Due Process "minimum contacts" test. Such letters are written outside of a commercial context and result in no direct benefit to the sender. The sender merely acquiesces in a request of the student or fellow researcher to provide an evaluation, and does not affirmatively seek the benefits of the distant forum. The effect of the judgment below would be to diminish faculty members' willingness to provide evaluations, interfering with a source of information important to employers, such as the Colorado hospital in this case, and institutions of higher education. Amici urges this Court to reverse the judgment of the court of appeals.

ARGUMENT

I. DISCHARGE OF FACULTY MEMBER'S DUTY TO RESPOND TO AN INQUIRY ABOUT A STUDENT OR FELLOW SCHOLAR SHOULD NOT ALONE SERVE AS THE BASIS FOR PERSONAL JURISDICTION.

Among the professional duties of a faculty member such as Professor Connolly is the evaluation of current and former students and fellow scholars. This obligation arises as part of the faculty member's responsibilities to his or her discipline and to society. We address in this section the nature and sources of the obligation and the important interests advanced by such evaluations. We argue that discharge of this professional duty alone should not subject a faculty member to suit in any locale where the evaluation might be transmitted. The section concludes with some observations about the national character of higher education in America and a brief examination of the unfair burdens imposed on an individual professor by litigation in a distant forum.

The academic profession is unique in that its domain includes all fields of learning and its objectives are the acquisition and transmission of knowledge. This Court has on many occasions addressed the importance to society of the "speculation, experiment and creation" fostered by high education and its role as the "marketplace of ideas." [3] As Justice Frankfurter observed in *Wieman v. Updegraaf*,

> the functions of educational institutions in our national life and the conditions under which they alone can adequately perform them are at the basis of . . . limitations upon State and National power.

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[3] *E.g., Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (opinion of Powell, J.); *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

344 U.S. 183, 197 (1952) (Frankfurter, J., concurring). Amici urge that due process compels such a limitation on the reach of the Colorado long-arm statute by virtue of the essential function of letters of appraisal, which we address in Part I, and the absence of minimum contacts between Professor Connolly and Colorado, addressed in Part II.

A. A Faculty Member Has a Professional Obligation to Evaluate Students and Fellow Researchers.

Institutions of higher learning function for the purposes of advancing the frontiers of knowledge through research and study and disseminating cumulative knowledge through teaching. The direct participants in these endeavors are faculty members, who are masters of complex bodies of knowledge, and students, who are the next generation of scholars and citizens. The close interactions of academic life afford faculty members a special opportunity to assess the strengths and weaknesses of students and fellow researchers. The academy is traditionally and necessarily responsible for the evaluation of those who study and conduct research there, and the primary source of these assessments is the professional judgments of the members of its faculty.[4] *Regents of the University of Michigan v. Ewing*, 54 U.S.L.W. 4055, 4058 (U.S. Dec. 12, 1985). Professional evaluation occurs not only within an institution but also, as in this case, beyond its walls.

A faculty member's obligation to assess the work of students and fellow researchers is part of the responsibility to his or her discipline. The noted sociologist Edward Shils has observed:

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[4] The 1966 *Joint Statement on Government of Colleges and Universities* specifies that faculty members have primary responsibility for the academic evaluation of students and for matters relating to faculty appointment, promotion, and tenure. AAUP POLICY DOCUMENTS AND REPORTS 105, 109 (1984). The *Joint Statement on Government* was formulated by AAUP, ACE, and the Association of Governing Boards of Universities and Colleges.

> One of the obligations of every teacher and of everyone who does scientific or scholarly research is to scrutinise the tradition of his subject, to winnow out the valid and important from the invalid and unimportant. This must be done both in teaching and research. The critical scrutiny of the tradition and particularly of the most recent increments to it is an obligation of an university teacher to his colleagues in his own university and at others, present and future, even where it requires that he render negative judgments on their work.

THE ACADEMIC ETHIC 59 (1983).[5] A faculty member is thus under a professional obligation to respond to inquiries about former students and fellow researchers with an honest assessment, whether positive or negative.[6]

In the instant case Professor Connolly's duty to respond, which Dr. Burt has conceded, arose from not only his obligations as a faculty member but also his responsibilities as a physician. Connolly's letter was an integral part of a process for assuring that patients requiring orthopedic surgery in Colorado receive care that is adequate. His obligation to his discipline is thus coupled with a duty to protect public health.

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[5] *See* J. Brubacher, ON THE PHILOSOPHY OF HIGHER EDUCATION 102-03 (1977) (ethical obligation of scholar to discipline).

[6] Another expression of this obligation, and the absence of financial return for its discharge, is found in a policy statement of the American Council on Education concerning the confidentiality of faculty evaluations:

> Institutions have long based the appointment and advancement of faculty members on academic qualifications described rigorously in evaluations of an individual candidate's work by academic peers inside and/or outside the institution. At many institutions these evaluations, provided without fee as a professional duty, are submitted in confidence.

Confidentiality of College and University Faculty Personnel Files: Its Appropriate Role in Institutional Affairs, Self-Regulation Initiatives: Guidelines for Colleges and Universities, American Council on Education (Dec. 1981).

Letters of appraisal from faculty members help assure that prospective employers have full information about students they contemplate hiring and that colleges and universities are well informed in making decisions concerning faculty appointments. Where a letter expresses a negative judgment, as in this case, the information nonetheless retains a great measure of social utility. (We note that judges are among the beneficiaries of faculty evaluations, as they frequently contact law professors for references concerning prospective clerks.) The inevitable consequence of affirmance of the court of appeals decision would be to diminish faculty members' willingness to discharge this obligation, at least with respect to evaluations destined to cross state lines.[7] This would have a deleterious impact on the placement of students completing professional, graduate, and undergraduate education and also on the evaluation of faculty members. The reluctance of "outside evaluators," whose views are commonly solicited on matters of faculty appointment, reappointment, and tenure, would erode the peer review system, which the Seventh Circuit has called "the very lifeblood and heartbeat of academic excellence." [8] The court, speaking in the

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[7] Some university placement offices keep general letters of reference about students from faculty members on file. The placement office may send out copies of such a letter directly to prospective employers, without notice to the author of the letter. The faculty member thus would not even know when a recommendation letter was transmitted out of state.

[8] *EEOC v. University of Notre Dame Du Lac*, 715 F.2d 331 (7th Cir. 1983). The importance of the peer review system has been stressed in cases holding that the need for confidentiality in faculty evaluations may outweigh the importance of discovery in a civil rights action. *Gray v. Board of Higher Education, City of New York*, 692 F.2d 901 (2d Cir. 1982); *Keyes v. Lenoir Rhyne College*, 552 F.2d 579 (4th Cir. 1977); *Zaustinsky v. University of Cal.*, 96 F.R.D. 622 (N.D. Cal. 1983); and *McKillop v. Regents of Univ. of Cal.*, 386 F.Supp. 1270 (N.D. Cal. 1975). The major rulings to the contrary are *EEOC v. Franklin and Marshall College*, No. 84-1739 (3d Cir. filed October 21, 1985) and *In re Dinnan*, 661 F.2d 426 (5th Cir. 1981).

context of a dispute over the subpoena of confidential evaluation materials, went on to indicate that

> The tenure review process requires that written and oral evaluations submitted by academicians be completely candid, critical, objective and thorough in order that the University might grant tenure only to the most qualified candidates based on merit and ability to work effectively with colleagues, students, and the administration.

715 F.2d at 336. Just as unfettered discovery would seriously compromise this process, so too would the specter of litigation in distant forums.

We note finally that the substantive law of defamation itself reflects the societal importance of letters of reference. A letter of appraisal to a prospective employer is a classic type of communication which, even though defamatory, is privileged when it is made in the interest of both the sender and the recipient. RESTATEMENT (SECOND) OF TORTS § 596 (1977).[9] The likelihood that Professor Connolly will prevail on the merits in this action, however, does not mitigate the inappropriateness of Colorado as the forum for the contest. The substantive privilege rather further illustrates the value to society of letters of reference.

B. Exposure to the Risk of Litigation Anywhere in the Country Imposes an Unreasonable Burden on a Faculty Member.

We turn next to a brief demonstration that, given the scope of student migration, faculty members would be

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[9] As one commentator has observed, "[t]he privilege is most frequently invoked in cases involving reports by present or former employers to prospective employees." R. Sack, LIBEL, SLANDER, AND RELATED PROBLEMS 305 (1980). The privilege has been applied to communications to faculty tenure committees. *See Colson v. Steig*, 89 Ill.2d 205, 433 N.E.2d 246 (1982) (scope of qualified privilege for defamatory communications to tenure committee measured by test of "actual malice"); *Petroni v. Board of Regents*, 115 Ariz. 562, 566 P.2d 1038 (Ariz. Ct. App. 1977) (absolute privilege applied).

exposed to the possibility of litigation anywhere in the country under the analysis of the court of appeals. This part concludes with some observations about the burdens on a faculty member arising from litigation in a distant forum.

Higher education in the United States was essentially a local phenomenon until after the Civil War.[10] The typical pre-Civil War college, urban or rural, drew its student body from the immediately surrounding environs and was quite unknown fifty miles from its campus. Only a few institutions were sufficiently famous to attract students willing to overcome the obstacles of geography. After the Civil War both business and the professions assumed a national character and many local colleges added graduate schools for advanced training. The graduate schools brought the institutions a wider reputation, and eventually a national market developed for both students and professors. This mobility today is reflected in statistics on student migration to college.

The National Center for Education Statistics, an arm of the Department of Education, reported that in the fall of 1981, 548,091 new out-of-state students enrolled for the first time in undergraduate, graduate, and professional schools.[11] In 1975, the percentage of out-of-state undergraduates was 30% or more in ten states.[12] One would expect the figures to be even higher for graduate and professional education, by virtue of the smaller number of institutions offering advanced training.[13] Such figures

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[10] This description is drawn from C. Jencks and D. Riesman, THE ACADEMIC REVOLUTION 155-198 (1969). *See* W. Metzger, ACADEMIC FREEDOM IN THE AGE OF THE UNIVERSITY (1955).

[11] Nat'l Center for Education Statistics, DIGEST OF EDUCATION STATISTICS—1983-84 90 (1983).

[12] ACE, 1984-85 FACT BOOK ON HIGHER EDUCATION 140 (1984).

[13] The nationwide character of medical training is also illustrated by the national placement program for medical residencies, known

support the common sense observation that the former students of a faculty member such as Professor Connolly are dispersed throughout the country. Fellow scholars are also widely scattered.

The enormous inconvenience to the individual faculty member sued in a distant locale because of a letter of reference cannot be overstated. The faculty member, unfamiliar with the forum, would lack information about attorneys in the area and would be personally burdened with making inquiries. In contrast, a commercial concern such as a magazine publisher has staff and resources to employ in locating the most suitable attorney. The professor's financial resources to retain an attorney would probably be modest, as the average faculty salary in the country in 1983-84 was $29,130.[14] As an extreme example, a faculty member at a small rural institution located in an area with a relatively low cost living might be sued in a major metropolitan area with a high cost of living and similarly high attorneys fees. The inconvenience and expense to the individual of retaining a lawyer in an unknown and distant locale are formidable.

After retaining an attorney, the professor would then face logistical difficulties in consulting with the attorney and attending the trial. These obstacles would further increase the costs and would also magnify the intrusion on the professor's scholarly work.[15] While litigation inevitably poses a burden on its participants, the burdens on an individual faculty member vulnerable to suit any-

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as the National Resident Matching Program. See J. Graettinger, *Balance in Medical Education Networks*, 55 J. of Medical Educ. 159 (March 1980) (comparing "import" and "export" of medical graduates to residencies, by state).

[14] *Annual Report on the Economic Status of the Profession 1984-85*, 71 ACADEME 7 (March-April 1985).

[15] *See* Comment, *Forced Disclosure of Academic Research*, 37 VAND. L. REV. 585 (1984).

where in the country because of a professional reference solicited, without compensation, on behalf of an individual are plainly excessive.

II. DUE PROCESS "MINIMUM CONTACTS" TEST FOR PERSONAL JURISDICTION IS NOT MET BY MERELY SENDING SOLICITED LETTER OF RECOMMENDATION INTO THE FORUM.

The Due Process Clause of the Fourteenth Amendment limits the ability of states to assert jurisdiction over nonresident defendants. The clause requires that jurisdiction be predicated upon the defendant's "minimum contacts" with a state, *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945), and imposes a standard of "fair play and substantial justice." *Milliken v. Meyer*, 311 U.S. 457, 463 (1940), *quoted in World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980). A primary concern is the burden on the defendant if he were required to defend in the state. Imposition of this burden is constitutional only where the defendant "purposefully avails itself of the privilege of conducting activities within the forum. . . ." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

There is no mechanical test for whether minimum contacts exist; rather, the facts must be weighed on a case by case basis. *Kulko v. Superior Court of California*, 436 U.S. 84, 92 (1978). "Few answers will be written in black and white. The greys are dominant and even among them the shades are innumerable." *Id.* at 92, *Estin v. Estin*, 334 U.S. 451, 545 (1948). In particular, it is not automatically sufficient that the defendant engaged in conduct having effects in the forum. In *World-Wide Volkswagen, supra*, the defendants had sold a car to the plaintiff which caused physical injury to the plaintiff in the forum; jurisdiction was nonetheless denied.

Similarly, in *Kulko v. Superior Court, supra*, the defendant had allowed his daughter to move to California to

be with his ex-wife. In the ensuing child support litigation, the lower court predicated jurisdiction upon the fact that in so doing the defendant had "caused an effect" within the state. 19 Cal. 3d 514, 521, 564 P.2d 353, 356 (1977). It held that the exercise of jurisdiction was reasonable because the defendant had purposefully availed himself of the benefits of forum law. This Court reversed. While agreeing that any effects test must be qualified by a requirement of "reasonableness," 436 U..S at 96, the opinion denied that the exercise of jurisdiction was reasonable because the defendant had not purposefully derived a benefit from activities relating to the state of California.

This Court's reasonableness requirement is not satisfied on the facts of the case at hand, because as in *Kulko* the defendant has not purposefully availed himself of the benefits and protection of the forum law. As in *Kulko*, the defendant's noncommercial activities, undertaken solely at the request of the party proposing jurisdiction, cannot meet the minimum contacts threshold. There are three respects in which Dr. Connolly's letter, like the father's action in *Kulko*, has not met the minimum contacts test. The recommendation letter was noncommercial; it was written solely at the behest of the plaintiff; and the imposition of jurisdiction would discourage compliance with such requests by other recommenders in the future.

A. Jurisdiction May Not Be Predicated on the Defendant's Noncommercial Activities.

In assessing jurisdiction, an "essential criterion in all cases is . . . the quality and nature of the defendant's activity." *Kulko*, 436 U.S. at 92, *citing International Shoe v. Washington*, 326 U.S. at 316-17. The *Kulko* opinion recognized two situations in which the forum effects of the defendant's activities might supply a reasonable basis for jurisdiction. These two situations arose where the effect of the defendant's conduct was physical injury in the state; and where the defendant sought or derived com-

mercial benefit from solicitation of business with a forum resident. *Kulko*, 436 U.S. at 96. As in *Kulko*, there can be no claim in the case at hand of physical injury to property or persons within the forum.

The alternative criterion of reasonableness—the commercial nature of the defendant's activities—is likewise obviously not satisfied in the present case. This criterion stems from the policies underlying the expansion of jurisdiction that occurred in the middle of this century.

> The vast expansion of our national economy during the past several decades has provided the primary rationale for expanding the permissible reach of a State's jurisdiction under the Due Process Clause. By broadening the type and amount of business opportunities available to participants in interstate and foreign commerce, our economy has increased the frequency with which foreign corporations actively pursue commercial transactions throughout the various States. In turn, it has become both necessary and, in my view, desirable to allow the states more leeway in bringing the activities of these nonresident corporations within the scope of their respective jurisdiction.

Helicopteros Nacionales de Colombia v. Hall, 104 S.Ct. 1868, 1876 (1984) (Brennan, J., dissenting). *Accord*, *World-Wide Volkswagen*, *supra*, 444 U.S. 286, 293 (noting such historical developments and their acceleration).

There are several reasons for treating commercial enterprises differently from noncommercial activities. First, it is usually not burdensome for a party to defend himself in a state where he engages in economic activity. *World-Wide Volkswagen*, 444 U.S. at 298-99. For this reason, it may be appropriate to impose different standards upon businesses, which are better situated to defend lawsuits, than on individuals. *Shaffer v. Heitner*, 433 U.S. 186, 204 n.19 (1977). Second, a commercial enterprise that purposefully avails itself of the privilege of conducting

activity in the forum is well situated to protect itself from the burdens of mounting a defense:

> [I]t has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connections with the State.

World-Wide Volkswagen, 444 U.S. at 297. These possibilities are not available to private parties, such as Dr. Connolly.

Third, subjection to jurisdiction is a reasonable quid pro quo for the extension of the benefits of conducting business locally. Defendants who conduct local business commonly rely upon local police powers to protect their own interests; and subjection to local powers is therefore not unfair. It is the existence of such a benefit that makes the exercise of jurisdiction based upon the forum effects of the defendant's conduct "reasonable." *Kulko*, 436 U.S. at 96-97. The existence of such a benefit is crucial to the assertion of jurisdiction, for even where the state has a strong interest in entertaining a dispute, jurisdiction is improper unless the defendant derives some benefit from his or her activities. *Kulko*, 436 U.S. at 100.

To suffice for jurisdictional purposes, this benefit may not be "attenuated," *World-Wide Volkswagen*, 444 U.S. at 299, or stem from some mere "collateral relation to the forum state." *Id.* Nor may it be a mere benefit to third parties. *Kulko*, 436 U.S. at 94 n.7. Thus, in *World-Wide Volkswagen*, jurisdiction was improper even though this Court conceded arguendo that the defendant received substantial revenues from automobiles used within the forum; this was inadequate benefit for personal jurisdictional purposes. 444 U.S. at 298. In *Kulko*, likewise, it was an insufficient "benefit" that the father's expenses were reduced when the children left to live with their mother in California. 436 U.S. at 95.

In contrast, in upholding jurisdiction over one commercial publisher in a defamation action brought in a state in which the defendant had sold magazines, this Court emphasized that the defendant had "continuously and deliberately exploited the New Hampshire market." Having entered the local market the defendant could be charged with knowing local laws "and no doubt would have claimed the benefit of them if it had a complaint against a subscriber, distributor, or other commercial partner." *Keeton v. Hustler Magazine, Inc.*, 104 S.Ct. 1473, 1480, 1481 (1984).

The defendant in the present case has neither sought nor derived any commercial benefit from the state of Colorado; indeed, Professor Connolly has neither sought nor derived a benefit of any kind, "attenuated," "collateral," or otherwise. His situation is thus very different from that of the employees of the National Enquirer who were named as defendants in *Calder v. Jones*, 104 S.Ct. 1482 (1984). Those defendants, the editor and a reporter, were making their living writing the kind of journalism the National Enquirer purveys. Furthermore, Connolly did not derive any financial return from the activities in question that would pay for insurance. He has no "customers" upon whom to impose his costs. Nor is he positioned to call upon the forum's courts to enforce any claims of his own. Writing a letter of recommendation "is not a commercial act and connotes no intent to obtain or expectancy of receiving a corresponding benefit in the State that would make fair the assertion of that State's judicial jurisdiction." *Kulko*, 436 U.S. at 101. It is therefore an inadequate basis for jurisdiction.

B. Jurisdiction May Not Be Predicated on Mere Acquiescence In or Compliance With a Request of the Plaintiff.

In the usual commercial context, the defendant engages in a course of conduct with the expectation of procuring some benefit. In the present case, the defendant contem-

plates no such advantage. The explanation for the defendant's actions lies elsewhere; the defendant's conduct amounted to mere compliance with a request initiated by the plaintiff, who sought a professional opportunity. But mere acquiescence in or compliance with the plaintiff's request for a letter is not an adequate basis for jurisdiction.

This principle is illustrated by those precedents in which direct commercial benefit to the defendant was found wanting. In such situations, the lack of benefit to the defendant goes hand in hand with the existence of an alternative motivation for the complained-of activities, namely, a request by the plaintiff. Thus, in *Kulko v. Superior Court* the explanation for the father's decision to send the daughter to his ex-wife in California was the ex-wife and child's request, rather than any expectation of benefit. 436 U.S. at 87. Similarly, in *World-Wide Volkswagen*, the automobile in question found its way into Oklahoma merely because the plaintiff drove the car to that state. The defendant automobile dealer derived no benefit from the car's removal to Oklohoma; it merely acquiesced in the new owner's decision to drive the car there. 444 U.S. at 297 (emphasizing that defendant made no effort to serve forum markets). What these two cases have in common with the present litigation is that the contact with the forum is undertaken solely for the benefit of the plaintiff, and at the plaintiff's instigation.

The principle that mere acquiescence in the plaintiff's pursuit of a benefit cannot give rise to jurisdiction is sometimes phrased in terms of the insufficiency of the plaintiff's "merely unilateral activity." Numerous cases have affirmed that the plaintiff's unilateral connection with the state cannot confer jurisdiction over a nonresident defendant.[16] While this Court has spoken in

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[16] *Helicopteros Nacionales de Colombia, supra*, 104 S. Ct. at 1873; *World-Wide Volkswagen, supra*, 444 U.S. at 298; *Kulko*, 436 U.S. at 93-94, citing *Hanson v. Denckla*, 357 U.S. at 253.

terms of "unilateral activity", this phrase has not been construed literally to encompass only those of the plaintiff's decisions of which the defendant was unaware, or in which the plaintiff was uncooperative. For instance, the principle has been held to invalidate jurisdiction predicated upon the defendant's acceptance of checks drawn upon a forum state bank. *Helicopteros, supra*, 104 S. Ct. at 1873. Although the defendant in *Helicopteros* was surely aware of the bank on which the checks were drawn, and made no effort to object, this Court deemed such unilateral activity an improper consideration in the jurisdictional calculus.

Similarly, in *Kulko* the father was aware of the daughter's destination, and cooperated by purchasing an airplane ticket for her. After reiterating that unilateral activity does not satisfy the minimum contracts test, this Court continued:

> We cannot accept the proposition that appellant's acquiescence in Ilsa's desire to live with her mother conferred jurisdiction over appellant in the California courts in this action. A father who agrees, in the interests of family harmony and his children's preferences, to allow them to spend more time in California than was required under a separation agreement can hardly be said to have "purposefully availed himself of the benefits and protections" of California laws.

436 U.S. at 94. This principal that mere acquiescence in the plaintiff's unilateral preferences embodies several policies.

The first policy underlying the principle that mere compliance or acquiescence in the plaintiff's pursuit of a benefit is not sufficient basis for jurisdiction is that such conduct does not put the defendant on notice that he or she may be haled into court in the forum. Under both *World-Wide Volkswagen*, 444 U.S. at 297, and *Shaffer v. Heitner*, 433 U.S. at 216, assertion of jurisdiction turns on whether the defendant could reasonably have antici-

pated being subject to suit in the forum.[17] Mere acquiescence in a request by the plaintiff does not provide sufficient notice of this possibility, as this Court noted in *Kulko*:

> Appellant did no more than acquiesce in the stated preference of one of his children to live with her mother in California. This single act is surely not one that a reasonable parent would expect to result in the substantial financial burden and personal strain of litigating a child-support suit in a forum 3,000 miles away, and we therefore see no basis on which it can be said that appellant could reasonably have anticipated being "haled before a [California] court".

436 U.S. at 97. Like the father in *Kulko*, Professor Connolly simply had no reason to believe that complying with a request for a letter of recommendation would subject him to suit in a grossly inconvenient forum.

A second rationale underlying the principle that mere acquiescence in the plaintiff's pursuit of a benefit does not suffice for jurisdiction is the simple concern for fundamental fairness. "Fair play and substantial justice" is, of course, the touchstone of due process analysis. *International Shoe v. Washington*, 326 U.S. at 316. In the present case, the defendant has remained in Nebraska, the state in which his relationship with the plaintiff is centered. It is the plaintiff who has moved to another state. In *Kulko*, "basic considerations of fairness" were said to point "decisively" in favor of litigation in the defendant's home state where "it is [the defendant] who has remained in the State of the marital domicile, whereas it is [the plaintiff] who has moved across the continent." 436 U.S. at 97. As in the present case, the parties' relationship was centered in another state, and had virtually no connection with the forum. There is no unfairness in

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[17] *See* concurring opinion by Justice Stevens in *Shaffer v. Heitner*, 433 U.S. at 217-19.

requiring the plaintiff to litigate this case in Nebraska, a state with which he has ample contact by virtue of his three-year medical residency. There is, however, fundamental unfairness in subjecting the defendant to jurisdiction in Colorado simply because he complied with a request made in pursuit of plaintiff's own self-interest.

This principle is somewhat analogous to the general rule that process may not be served over a defendant who has been lured into the forum by the plaintiff. In *Wyman v. Newhouse*, 93 F.2d 313 (2d Cir. 1937), the defendant had entered the forum at the plaintiff's request, solely in order to see the plaintiff one last time before she left for Europe indefinitely. Jurisdiction was denied, as it is in cases where plaintiffs seek to attach property which they have tricked the defendant into sending into the forum. F. James & G. Hazard, CIVIL PROCEDURE 102 (3d ed. 1985); RESTATEMENT (SECOND) OF CONFLICT OF LAWS sec. 82 (1969).

A third policy underlying the refusal to grant jurisdiction based upon the defendant's acquiescence in the plaintiff's request is that predicating jurisdiction upon such contacts will discourage cooperative activities by defendant. As a general matter, courts are reluctant to penalize compliance with plaintiff's requests where the effect of doing so would be to deter socially desirable conduct. We turn finally to this consideration.

C. Assertion of Jurisdiction Is Improper Where It Would Discourage Socially Desirable Conduct.

Defense of a lawsuit in an inconvenient forum is, as argued earlier, an enormous imposition. Where commercial activity is involved, the risk of expense of an occasional lawsuit may be warranted. Where, in contrast, jurisdiction is predicated upon conduct undertaken at the plaintiff's request and not for the defendant's benefit, the consequences of imposing such a cost are easy to envision. Defendants will simply refuse to engage in such conduct, which offers them no prospect of advantage. In the pres-

ent context, this means quite simply that academic people will decline to serve as references. As argued in Part I, this is to the detriment of future individuals who will be unable to obtain letters of recommendation, and of those institutions that cannot make intelligent admissions, appointments, or employment decisions without the sort of candid information that letters of recommendation contain.

The calculus of personal jurisdiction frequently takes into account the impact of asserting jurisdiction upon the actions of future parties. *Kulko v. Superior Court* provides perhaps the best example. The California Supreme Court below had held, and this Court agreed, that jurisdiction could not be predicated upon the fact that the mother resided in California. 19 Cal. 3d. at 523-524, 564 P.2d at 537; 436 U.S. at 93. "[T]o find personal jurisdiction in a State on this basis, merely because the mother was residing there, would discourage parents from entering into reasonable visitation agreements." *Id.* This Court also denied that jurisdiction should turn on whether the defendant had cooperated in his daughter's departure, as opposed to trying unsuccessfully to prevent it. Such a distinction, wrote this Court, "would impose an unreasonable burden on family relations." 436 U.S. at 98. Cooperative activity in difficult domestic situations should be rewarded, rather than being penalized by predicating jurisdiction upon it. The same is true with respect to candid letters of appraisal.

There are other situations in which personal jurisdiction analysis has turned on the deterrent consequences of asserting jurisdiction. The general rule, for example, is that witnesses voluntarily attending trials are immune from service of process. F. James & G. Hazard, CIVIL PROCEDURE 99 (3d ed. 1985). The underlying rationale was explained in *Stewart v. Ramsay*, 242 U.S. 128 (1916).

> [T]he administration of justice would in a variety of ways be obstructed, if parties and witnesses were

> liable to be served with process, while actually attending the court. It is often a matter of great importance to the citizen, to prevent the institution and prosecution of a suit in any court, at a distance from his home and his means of defense; and the fear that a suit may be commenced there by summons will as effectually prevent his approach as if a *capias* might be served upon him.

242 U.S. at 129. See also, *Lamb v. Schmitt*, 285 U.S. 222 (1931). The most obvious evil consequence of asserting jurisdiction based upon the witness' presence is the one just mentioned: witnesses would be reluctant to enter the state. But there is an additional problem. The potential witness might fear that suit would turn on whether that party was pleased or displeased by the witness' testimony.

> Witnesses would [not only] be chary of coming within our jurisdiction, [but would also] be exposed to dangerous influences, if they might be punished with a lawsuit for displeasing parties by their testimony.

242 U.S. at 130-31.

A similar danger is presented by predicating jurisdiction upon the sending of a solicited letter of appraisal. Not only is the referee discouraged from writing a letter; unflattering letters are the ones least likely to be written because those are the ones likely to provoke litigation. If the decision of the court below is allowed to stand, the eventual result will be fewer letters of recommendation, or more unduly positive ones.

The decision below promotes the interests of one single individual, Dr. Burt, at the expense of not only individuals like Dr. Connolly who have written candid letters of appraisal, but also all other individuals who may need letters of recommendation in the future and of all of those institutions who need accurate information on which to base their decisions about individuals. The due process

minimum contacts calculus does not contemplate basing jurisdiction upon altruistic actions such as the mailing of a solicited letter of recommendation to a fortuitous forum.

CONCLUSION

For the foregoing reasons, *amici curiae* American Association of University Professors, American Council on Education, and Association of American Medical Colleges respectfully urge that the Court reverse the judgment of the court below.

Respectfully submitted,

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